

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

COSTA AND RIHL, INC.
d/b/a ENCOMPASS MECHANICAL SERVICES

Employer¹

and

Case 4–RC–20308

LOCAL NO. 351, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO

Petitioner²

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

¹ The name of the Employer appears as corrected at the hearing.

² The name of the Petitioner appears as corrected at the hearing.

5. Costa & Rihl, Inc. d/b/a Encompass Mechanical Services, Inc. (herein called the Employer) is a Delaware corporation with a facility at 3900 Church Road in Mount Laurel, New Jersey, where it is engaged in providing construction contracting services. The Petitioner seeks to represent a unit of 11 electricians and apprentice electricians based at the Mount Laurel facility. The Employer takes the position that the petition should be dismissed because its electrical operations at the facility have ceased.³

For approximately 30 years Costa & Rihl, Inc., the Employer's predecessor, performed heating, ventilation and air conditioning (HVAC) and plumbing services in southern New Jersey. In January 2000, Costa & Rihl was sold to Encompass Mechanical Services and became Costa & Rihl, Inc. d/b/a Encompass Mechanical Services, Inc. Soon thereafter, the Employer acquired a small residential electrical company, which it based at the Mt. Laurel facility and organized as its Electrical Division.

The Employer is one of three companies that comprise the Encompass Mid-Atlantic Region of Encompass Services Corporation, a nationwide conglomeration of construction contracting businesses. The other two companies are REMCO and Tri-M. John Harman is the President of the Northeast Region of Encompass Services Corporation. Reporting to him is John Rihl, the former owner and President of Costa & Rihl, Inc. John Rihl now serves as Encompass Services Corporation's Vice President of Business Development for the Mid-Atlantic Region. Rihl has held that position since the Employer purchased Costa & Rihl in January 2000. Thomas Apicella is the Vice-President and General Manager of the Mt. Laurel facility.

In addition to its Electrical Division, the Mt. Laurel facility houses the Employer's Mechanical Division and its Service Division. The Employer employs some 120 field employees in its Mechanical Division and 15 employees in its Service Division. The employees in the Mechanical Division fabricate sheet metal, service air conditioning units, install ductwork, piping, plumbing, toilet fixtures, diffusers and wall thermostats, and perform service work. Minor electrical work is performed in conjunction with the HVAC and plumbing work, but it is

³ The hearing in this matter was initially held on October 12, 15 and 18, 2001. During the October hearing days, the Employer argued that the Petition should be dismissed because it anticipated that its electrical operations would cease within a month. On December 5, 2001, the Employer filed a Motion to Open Record, in which it contended that it had shut down its Electrical Division and permanently laid off its employees who were covered by the Petition. On December 17, 2001, an Order Reopening Record and Notice of Hearing issued and testimony was taken on December 28, 2001.

During the October hearings, the Petitioner amended its petition to expand the bargaining unit description. However, in its brief filed before the hearing reopened, the Petitioner "stipulated" that the requested bargaining unit consisted of the following 11 employees who were employed in the originally petitioned-for bargaining unit: Gary Adams, Edward Ator, Charles Blasé, Joshua Cooper, Gregory Foster, Nicholas Gallo, Kenneth Kraus, Michael Margot, Probyn Morris, Michael Murphy, and David Young. On December 28, 2001, upon the reopening of the hearing, the Petitioner argued that an alternative unit, which would include all electricians and apprentice electricians performing work in New Jersey for any employer owned by the Employer's parent corporation, Encompass Services Corporation, was also an appropriate one. Later in the hearing, the Petitioner withdrew this argument.

The Employer contends that David Young is a supervisor within the meaning of Section 2(11) of the Act. In view of my finding that there is no question concerning representation, it will not be necessary to resolve this issue.

incidental to the latter type of work and, according to the Employer, none of it requires supervision by licensed electricians. In its Service Division, the Employer retains a core group of employees who perform service work exclusively. Other slots in the Service Division are occupied by field employees who rotate in and out. Five to 10 per cent of the service work performed by these rotating employees entails electrical work.

The employees in the Electrical Division had been performing work that involved wiring carrying more than 24 volts, and frequently as high as 120 volts. As a result, this work required oversight by a state-licensed electrician. This work included installing panels, lighting and switch gears, hanging bay lights, and powering up equipment. The electrical work had no HVAC or plumbing components. The employees performing this electrical work completed daily time cards unique to their Division, just as the Mechanical Division's employees did.

Since its inception there has been one instance of interchange in which employees from the Electrical Division were temporarily assigned to work in the Mechanical Division and another instance in which Mechanical Division employees were assigned to work temporarily in the Electrical Division.

Prior to the acquisition of the Electrical Division, the Employer did not employ a licensed electrician, and, therefore had never performed electrical work involving more than 24 volts. After the acquisition, the Employer initially employed George Bingaman, the former owner of the company which became its Electrical Division. Bingaman possessed the necessary electrical license and thus was able to supervise the Employer's electrical work. After Bingaman left, estimator Jack Ewing, who holds an electrical license, performed this supervision, thereby permitting the Employer to continue its work in New Jersey. At least one other individual employed in the Electrical Division, David Young, also held a license.

The Electrical Division was unprofitable from its inception. The Employer was hired to do commercial jobs, but its employees' experience lay mostly in residential work. Ultimately the Employer realized a profit on just one of its electrical contracts.

On Thursday, September 27, 2001, David Young resigned his position in the Electrical Division after giving one week's notice. The following day the remaining 10 employees in the petitioned-for unit gave one week's notice of their resignations.⁴ The Union filed the petition the following Wednesday, October 3, 2001. John Rihl testified that after the employees resigned, but prior to the filing of the petition on October 3, 2001, the Employer made a final decision to cease the operations of the Electrical Division. Rihl testified that he and John Harman, President of the Northeast Region, made this decision because there were no employees to perform the electrical contracting work. The decision, which coincided with the employees' mass resignation, the last of which occurred on September 28, 2001, was articulated in Rihl's conversation with Harman on the same date. In a telephone conference call on October 1, 2001, Rihl and Harman informed the Employer's corporate counsel in Houston, Texas that they were closing the Electrical Division. On October 2 and 3, 2001, all of the employees, including Young, rescinded their resignations and continued working. Rihl instructed Trade Manager Ed Lynch to accept the rescissions, but further told Lynch that the Division would close once the

⁴ The record does not indicate the reason for these resignations.

current jobs were completed. According to Rihl, the employees were not informed of the decision to close the Electrical Division because the Employer feared that they would not complete the jobs in progress.

On October 3, 2001, Rihl told estimator Jack Ewing that he would be laid off because the Employer had determined to cease bidding on electrical jobs. Ewing was preparing an estimate for one such job, but Rihl told Ewing not to send the estimate. The Employer also determined that it would subcontract the remaining work for the jobs already in progress. Also on October 3, 2001, Rihl informed the estimators in the Mechanical Division that the Electrical Division was closing and that they should no longer wait for input from them before submitting bids on mechanical work.

Thomas Apicella testified that he intended to lay off the employees when the Employer ran out of electrical work, and predicted that such work would end no later than October. Notwithstanding that expectation, Apicella admitted that, on September 27, 2001, he told several Electrical Division employees that he could promise them continued employment within Encompass Services Corporation. Apicella explained that he did this to ensure the employees did not leave the company while the Electrical Division had outstanding contracts. For the same reason, he did not tell the employees about the decision to close the Electrical Division. David Young testified that he was told that the electrical employees would keep working, performing HVAC work, until there was more electrical work.

The Employer had a number of ongoing projects in October 2001. It was engaged in performing work at a Fleming Foods job and expected to complete the work in two to three weeks. Another job, located in Northern New Jersey, known as the MultiLink project, was estimated to be completed in three days. Two jobs involving hooking up electrical generators to houses were scheduled to take approximately one to one and a half days to complete, and by Rihl's estimate, would be finished within two to three weeks. The last of these jobs was for Davis Enterprises and consisted of powering two rooftop units. The Employer estimated that this job would take two to three days to complete and the units would be powered within two to three weeks. The Employer had been negotiating a job with a customer named Greenwood, but on about October 5, 2001, it informed Greenwood that it would only do the mechanical work because it would no longer have its Electrical Division. Other bids were not withdrawn because the Employer had already been advised that they would not likely be accepted.

Notwithstanding the Electrical Division's lack of profitability, employees at the facility, including those in the Electrical Division, received incentive pay during the first quarter of 2001 based on the combined profitability of all of the Divisions. In addition, Thomas Apicella, with the authorization of Rihl, offered David Young a two-dollar raise to stay on with Encompass Services Company after he resigned at the end of September, 2001.

At the December 28, 2001 hearing, Thomas Apicella testified that the Employer had permanently laid off all 11 employees in the petitioned-for unit, the final two being released on November 2. That was the date of the last electrical work performed by Division employees. All affected employees were notified by letter of the termination of their employment. With respect to the unfinished jobs referred to above, all had been completed except for final

inspection of the two residential jobs by electrical inspectors from the townships involved. According to Apicella, if any electrical work remains to be done as a result of the final inspections on the two jobs, Jack Ewing, the Employer's former electrical estimator and the license-holder for the jobs, will do the work.

With respect to the jobs subject to outstanding bids, the Employer introduced documentary evidence showing that all but two had been rejected by the potential customers. One bid was orally withdrawn by the Employer and the Employer learned that the general contractor holding its other bid was not awarded its contract.

To rebut the Employer's showing that it had closed its Electrical Division, the Petitioner introduced evidence that the Employer displayed on Encompass Services Company's national website as late as December 27, 2001, a job posting for electricians. Apicella explained, however, that although he had instructed his human resources manager to remove the posting after the decision to close was made, the human resource manager's attempts to do so failed because she did not have the proper code to access the website.

The Board will not conduct an election when the employer's cessation of operations is imminent and certain. *Hughes Aircraft Co.*, 308 NLRB 82 (1992); *Martin Marietta Aluminum, Inc.*, 214 NLRB 646 (1974). In determining whether the cessation of operations is sufficiently imminent and certain to warrant dismissal of the petition, the Board considers factors such as the period of time between the representation hearing and the expected date of cessation, steps taken by the employer to cease operations, and whether the employees have been notified. See *Hughes Aircraft Co.*, supra, 308 NLRB at 82-83; *Davey McKee Corp.*, 308 NLRB 839, 840 (1992); *Larson Plywood Co., Inc.*, 223 NLRB 1161 (1976). Mere speculation as to the uncertainty of future operations is not sufficient to dismiss the petition. *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997); *Canterbury of Puerto Rico, Inc.* 225 NLRB 309 (1976).

The record from the reopened hearing shows that the Employer's operations in the Electrical Division have all but ended. The employment of all Electrical Division employees has been terminated, they have been so notified by letter, and there are no outstanding bids for electrical work. The remaining jobs under contract are completed except for the final inspections, and any work that may be required as a result of those inspections is minimal, and would be performed by the Employer's electrical estimator. Accordingly, I find that the Employer has ceased operations in its Electrical Division, and therefore dismissal of the Petition is warranted.

The Petitioner has suggested that the Employer may be diverting the electrical work formerly performed by its Electrical Division to other companies within the Encompass Mid-Atlantic Region of Encompass Services Corporation in an attempt to evade its obligations under the Act. Regardless of whether such conduct has occurred, the Employer's cessation of operations in its Electrical Division is certain. Accordingly, no useful purpose would be served in processing the petition at this time and I shall dismiss the subject petition. *Davey McKee*

Corp., supra, 308 NLRB at 840; *Hughes Aircraft Co.*, supra, 308 NLRB at 83; cf. *Norfolk Maintenance Corp.*, 310 NLRB 527, 528 (1993).⁵

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **March 7, 2002**.

Signed: February 21, 2002

at Philadelphia, PA

/s/

DANIEL E. HALEVY

Acting Regional Director, Region Four

347-8020-8050

⁵ To ensure the employees' statutory rights to an election, if the Employer does not cease operations I will entertain a motion from Petitioner to reinstate the petition. See *Davey McKee Corp.*, supra, 308 NLRB at 840; *Tracinda Investment Corp.*, 235 NLRB 1167 (1978)